

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-208148.3
B-208148.4

DATE: May 23, 1983

MATTER OF: M&M Services, Inc.; EPD Enterprises, Inc.

DIGEST:

1. Protest filed by twelfth low bidder before award, alleging that seventh and ninth low bidders are nonresponsive, is timely. Contrary to agency's assertion, protest did not need to be filed within 10 days of bid opening. Protester had a right to await outcome of agency deliberations which eliminated nine bidders lower than protester and, at the time the protest was filed, agency had not yet decided which bidder was entitled to award.
2. Protest alleging that rejected bid is nonresponsive is academic.
3. Bid for full food services is responsive in all material respects to IFB pricing schedule requiring that bid price for part "B" (variable costs) must be at least 25 percent of bid price for part "A" (fixed costs) for basic year and both option years. Although bid price for part "B" was only 24.94942 percent of bid price for part "A" in both option years, deviation was insignificant, prices for basic year met 25-percent requirement, prices for basic plus option years met requirement, and competition was not affected. Therefore, deviation was negligible and was properly waived as minor informality.

M&M Services, Inc. (M&M), and EPD Enterprises, Inc. (EPD), protest the United States Air Force's award of a contract to K.P. Services Co. (KP) pursuant to invitation for bids (IFB) No. F05600-82-B-0025, a 100-percent small business set-aside, for full food services at Lowry Air Force Base, Colorado. Both protesters contend that the KP bid was nonresponsive because it did not comply with the pricing format requirements in the IFB. The protesters

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also allege that the bid submitted by another unsuccessful bidder, Atchison Engineering Company (Atchison), was nonresponsive.

We deny the EPD protest of the award to KP, and we dismiss the protest involving Atchison as academic. Because we considered the EPD protest and M&M raised the same issues, we need not consider the Air Force's argument that M&M is not an interested party for filing a bid protest in our Office because this is a small business set-aside, and the Small Business Administration (SBA) regional office ruled on October 22, 1982, that M&M was other than a small business. (Though M&M appealed this decision to the SBA Size Appeals Board, counsel for M&M has advised our Office that the SBA Size Appeals Board denied its appeal on April 5, 1983.)

We must first determine whether the EPD protest was filed in a timely manner in accord with our Bid Protest Procedures (4 C.F.R. part 21 (1983)). The Air Force and KP contend that, since EPD's protest alleges improprieties which were contained in the bids of Atchison and KP, EPD should have been aware of its bases for protest when bids were opened on August 19, 1982. Therefore, the Air Force argues that the protest had to be filed within 10 days after the bases for protest were known or should have been known, September 2, 1982. 4 C.F.R. § 21.2(b)(2) (1983). Since EPD filed its protest in our Office on October 29, the Air Force concludes that the protest is untimely and should not be considered on its merits.

Atchison and KP were the seventh and ninth lowest bidders, respectively, while M&M was tenth lowest and EPD twelfth lowest. From bid opening until September 23, 1982, all bidders below Atchison (the first six lowest) and the eighth lowest bidder were eliminated from consideration for a variety of reasons. On September 23 and 24, preaward surveys were conducted on Atchison and KP. On September 23, M&M (which was next in line for award after Atchison and KP) filed a protest with the contracting officer; on October 6, M&M filed its protest in our Office. On October 22, SBA ruled that M&M was other than a small business and, therefore, ineligible for award. Since the eleventh lowest bidder had previously been ruled ineligible (both nonresponsive and nonresponsible), EPD was now next in line for award

after Atchison and KP once M&M was declared ineligible by SBA on October 22. EPD filed its protest in our Office against awards to Atchison and KP on October 29.

In our view, EPD's protest against award to Atchison or KP is timely because it was filed within 10 days after the Air Force eliminated from consideration all lower bidders but Atchison and KP. Up until October 22, apparently, the Air Force was still considering an award to M&M. At the very least, the Air Force was still trying to ascertain which firm was entitled to award when EPD filed its protest. A protester is not obligated to protest until an agency takes some action adverse to the protester's interest. See Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486. We find that EPD had a right to await the outcome of the Air Force's deliberations, which resulted in the rejection of nine lower bids, leaving only two bidders in line for award lower than EPD. Considering EPD's competitive position, twelfth low bidder, to require EPD to file its protest against the seventh and ninth low bidders within 10 days of bid opening is unreasonable, and we find the protest is timely.

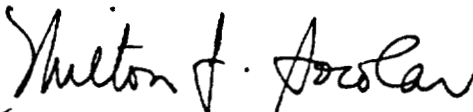
EPD's protest that Atchison's bid was nonresponsive because Atchison allegedly misrepresented its incorporation status will not be considered on the merits. The Air Force rejected Atchison because the SBA determined that Atchison was affiliated with Tamp Corporation, which was debarred for Service Contract Act violations, and the contracting officer concluded that, under Air Force regulations, Atchison's affiliation with a debarred company precluded award to Atchison. Atchison separately protested the rejection of its bid to our Office approximately 4-1/2 months after these protests were filed, and we will decide that protest in the future. However, since Atchison's bid was determined to be unacceptable by the Air Force for reasons unrelated to its statement of incorporation, the issue of whether its incorrect representation about its incorporation status made it nonresponsive is academic and this protest is dismissed. Slack Associates, Inc., B-195305, July 28, 1980, 80-2 CPD 69; Schweigert Construction; Bob Bak Construction, B-208114; B-208880, October 20, 1982, 82-2 CPD 349.

EPD contends that, under the IFB's terms, the KP bid was nonresponsive and for rejection. EPD cites the bid schedule which stated: "The total estimated bid for Part B for each year must be at least 25% of the total bid price for Part A for the corresponding year." The bid schedule further stated that failure to comply with this requirement "shall render the bid nonresponsive." Part "A" of the bid price schedule required a price for a basic monthly payment to cover the majority of fixed costs; part "B" required a price per meal and an extended price (price per meal multiplied by the estimated number of meals). The 25-percent requirement was applicable in the basic contract year and in both option years. EPD contends that KP's bid did not meet this requirement for the two option periods because EPD's bid price for part "B" in both option years was only 24.94 percent of the bid price for part "A."

The Air Force admits that the 25-percent requirement is a material provision of the IFB. However, the Air Force argues that KP's bid was so close to meeting the requirement that the deviation was properly waived as a minor informality. The Air Force contends that the 25-percent rule is for the sole benefit of the Government because it encourages the contractor to improve service in the hope of serving more meals. The Air Force points out that KP's bid actually meets the requirement for the basic year and when all 3 years are considered together. It is only for the 2 option years alone that KP bid less than 25 percent for part "B" than it bid for part "A"; in the option years, KP's bid for part "B" was 24.94942 percent of its bid for part "A." According to the Air Force, waiving this minor informality does not harm the Government. The Air Force also speculates that no other bidder was prejudiced since KP, had it realized that its part "B" price was less than 25 percent of its part "A" price, would probably have shifted \$1,552.25 from its part "A" bid to its part "B" bid to meet the 25-percent requirement without changing its total evaluated bid price. In the alternative, KP could have raised its part "B" price for each option period by \$1,940.31 without changing its part "A" price. In either event, KP would still have been the ninth lowest bidder, the relative standing of the bidders would not have changed, and KP would still have been entitled to award.

In spite of the IFB's specific instructions and statement that failure to comply "shall render the bid non-responsive," we conclude that KP's bid was so close to meeting the 25-percent requirement that it was properly considered responsive in all material respects. 52 Comp. Gen. 604 (1973). KP's bid complied with the requirement when the bid prices for all 3 years of the contract (basic plus both options) were considered, and the discrepancy has no impact on the competition. Therefore, the deviation is considered to be negligible and properly for waiver as a minor informality under Defense Acquisition Regulation § 2-405 (1976 ed.). See Arch Associates, Inc., B-183364, August 13, 1975, 75-2 CPD 106; W-I Forest Products, Inc., B-204168.2, February 17, 1982, 82-1 CPD 138. Moreover, the Government's interest in obtaining better service will be fulfilled in spite of KP's minor deviation from the IFB's provision. See 44 Comp. Gen. 581 (1965).

Protest is denied in part and is dismissed in part.

for 
Comptroller General
of the United States